Stroehmann Brothers Company *and* Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO-CLC, Local No. 6. Case 4-CA-12719

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 24 February 1983 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The complaint alleged, and the judge found, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wages of its employees in granting a Christmas bonus consisting of food instead of money. We agree with the judge that the Respondent's conduct was unlawful, but only for the following reasons.

The Respondent is a large baking enterprise with numerous facilities in Pennsylvania, New York, and Maryland. The Charging Party represents certain employees at a bread and roll plant in Norristown, Pennsylvania, and at a roll plant and a cake plant in Williamsport, Pennsylvania.[2] The following is based on credited record evidence.

For the 2 or 3 years preceding the events in question, Joseph Rauscher, the Charging Party's vice president, administered the Union's day-to-day affairs. The Union's president, Joseph Balzer, was out of the office most of that time because he was suffering from terminal cancer of the throat and mouth, and required repeated treatment.

For over 40 years, the Respondent had given its employees, union and nonunion, a Christmas bonus based on their length of service with the Company. Under this bonus system, which was not memorialized in the Union's collective-bargaining contract, the Respondent paid its employees between $5 and $10 if they had from 1 to 7 years of service, and paid an additional $2 per year to employees who had more than 7 years of service.

In the fall of 1981,[3] the Respondent decided to alter this longstanding practice. The Respondent's senior vice president in charge of labor relations, Charles Caffrey, told Rauscher that the Respondent wanted to change the bonus from cash to a food package, but did not want to do so without the employees' approval. He asked Rauscher to check with the employees at the Norristown plant to see if they would be willing to agree to the substitution.[4] Rauscher agreed to do so and to get back to Caffrey.

Within a day or two, Rauscher called the Norristown shop steward, James Martin, and asked him to take an informal poll on Caffrey's proposal. Toward the end of October, Martin informed Rauscher that he and committeeman Carl Minott[5] had taken the poll, and that the employees preferred to retain the cash bonus. Soon thereafter, Rauscher telephoned Caffrey at his Williamsport office and reported the results of the poll. Caffrey expressed regret at the news, and said, "[I]f that's the way it is, that's the way it is."

In early December, the Respondent distributed a gift package of cheese and sausage to its employees instead of the previous cash bonus.[6] In an accompanying letter, the Respondent's president extended traditional holiday greetings to the employees and stated that the gift was presented "in the holiday spirit, in recognition of [the employees'] contributions, as part of Stroehmann Brothers Company."

Rauscher, after relaying the employees' rejection of the proposed change in the bonus system, had heard nothing more of the matter until the Respondent distributed the food package instead of the cash. He then received a call from Martin, who reported that the employees were "screaming" because the gift package had been substituted for the cash bonus. Rauscher immediately telephoned Caffrey, who claimed that the change had been authorized by Balzer.[7] Rauscher said he knew noth-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We hereby correct the judge's finding that the Respondent was acquired by George Weston Limited in 1981, rather than in 1980.

[2] There is a third facility in Williamsport, a bread plant, which is not involved in this case.

[3] All dates are in 1981 unless otherwise indicated.

[4] These findings are based on the evidence given by Rauscher, a witness whose testimony the judge credited, but did not fully recount.

[5] We hereby correct the judge's inadvertent error in attributing the taking of the poll to union business agent Donald Tholan.

[6] In addition to the gift package, the Respondent gave a new cash bonus of $30 or $75, depending on seniority, to its unrepresented employees.

[7] Caffrey testified that he had spoken with Balzer twice in October about changing the bonus system, and had received no authorization during those conversations. However, Caffrey stated that on 7 November

Continued

ing about any such agreement, and Caffrey suggested that he check with Balzer. Rauscher later telephoned Balzer who was then in the hospital receiving additional treatment. Rauscher testified that he explained the situation, and that Balzer denied reaching any agreement with Caffrey.[8]

It is well settled that an employer violates its duty to bargain collectively when it institutes changes in employment conditions without notice to and bargaining with the union. *NLRB v. Katz*, 369 U.S. 736 (1962). Similarly, it is well established that a Christmas bonus consistently paid over a number of years is a term of employment, even though it is not expressly provided for in the bargaining agreement, and cannot be discontinued by the employer before the union has been given notice and an opportunity to bargain. *Aeroca, Inc.*, 253 NLRB 261, 264 (1980), enf. denied on other grounds 650 F.2d 501 (4th Cir. 1981); *Woonsocket Spinning Co.*, 252 NLRB 1170 (1980).[9]

The General Counsel established that the Respondent proposed replacing its previous cash bonus with a gift package if the employees agreed to the substitution. The Union accepted this proposal, polled the employees, and informed the Respondent of their decision not to accept the change. Thus, it is clear that the Union did not consent to the proposed new bonus system. The Respondent's subsequent action implementing the change was unauthorized and, as the judge found, was a violation of Section 8(a)(5) and (1) of the Act.[10]

In so finding, we reject the Respondent's contention that its action in implementing the change was excused because the parties had reached impasse. Impasse exists where the parties, after good-faith bargaining, have exhausted the prospects of concluding an agreement. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968). The credited testimony indicates that the parties had in fact reached agreement not to implement the new bonus system unless the employees consented to the change. This is the opposite of impasse, and, accordingly, we find no merit in the Respondent's proffered defense.

ORDER

The National Labor Relations Board orders that the Respondent, Stroehmann Brothers Company, Norristown and Williamsport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Without notice to or bargaining with Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO-CLC, Local No. 6, as the exclusive representative of the employees in the appropriate units set forth in article II of the collective-bargaining agreements between the Respondent and the Union covering the employees at the Williamsport and Norristown, Pennsylvania, facilities, discontinuing its cash Christmas bonus and substituting a food package.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate units concerning the discontinuance of the cash Christmas bonus.

(b) Reinstate for all employees in the appropriate units the cash Christmas bonus discontinued by the Respondent in December 1981.

(c) Make whole the employees in the appropriate units for the Respondent's failure to pay the cash Christmas bonus with interest computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[11]

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he saw Balzer at a cocktail party where Balzer said, "By the way with respect to the Christmas bonus issue: it's okay, go ahead and do it, but make sure that the gift is nice." The judge, however, did not credit Caffrey's testimony.

[8] During the course of the hearing, the parties recognized that, due to his health, Balzer would not likely be able to attend the hearing and testify concerning the events in issue. Therefore, the judge admitted an affidavit which Balzer had earlier given to a Board agent investigating the case. In light of Rauscher's credited testimony, we do not rely on Balzer's affidavit, and thus find it unnecessary to consider the Respondent's exception to its admission into evidence.

[9] Inasmuch as the Christmas bonus was based on an employee's length of service, i.e., seniority, and had been given by the Respondent for over 40 years, Chairman Dotson and Member Hunter agree that the Christmas cash bonus became part of the employees' terms and conditions of employment and thus a subject over which an employer must bargain with a union.

[10] The Respondent excepts to the judge's exclusion of evidence concerning negotiations with other unions about the change in the bonus system. Essentially, the Respondent sought to establish that it had barg .ned with 14 other unions at different locations over the change, and that, where the change had not been agreed to, it had not been implemented. While we recognize that the proffered evidence could have some relevance to the material issues, we note that administrative law judges are authorized to exclude such evidence "if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. As Justice Holmes observed in *Reeve v. Dennett*, 145 Mass. 23, 11 N.E. 938, 943-944 (1887), such a rule is a necessary "concession to the shortness of life." In this case, the evidence the Respondent sought to introduce had little probative value regarding the bargaining between the Respondent and this Charging Party, and would have opened up a number of collateral issues, the exploration of which would have consumed a great deal of time. Accordingly, we affirm the judge's ruling excluding this evidence.

Contrary to the judge, Chairman Dotson would offset the value of the food package against the cash bonus to be paid to the employees. To do otherwise, in the Chairman's view, would bestow on the employees an unwarranted windfall.

[11] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Post at its Williamsport and Norristown, Pennsylvania, facilities copies of the attached notice marked "Appendix B."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discontinue our cash Christmas bonus and substitute a food package without notice to or bargaining with Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO-CLC, Local No. 6, as the exclusive representative of the employees in the appropriate units set forth in article II of the collective-bargaining agreements between us and the Union covering employees at the Williamsport and Norristown, Pennsylvania, facilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the appropriate units concerning the discontinuance of the cash Christmas bonus.

WE WILL reinstate the cash Christmas bonus which we discontinued in December 1981 for all employees in the appropriate units.

WE WILL make whole the employees in the appropriate units for our failure to pay the cash Christmas bonus, with interest.

STROEHMANN BROTHERS COMPANY

DECISION

PRELIMINARY STATEMENT—ISSUE

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding[1] under the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. (the Act), was litigated before me in Philadelphia, Pennsylvania, on November 29–30, 1982, with all parties participating throughout by counsel, who were accorded full opportunity to present evidence and contentions, as well as to file proposed findings and conclusions and also briefs received on January 24–25, 1983. Record, proposed findings and conclusions, and briefs have been carefully considered.

The principal issue is whether the Respondent Employer, Stroehmann Brothers Company, violated Section 8(a)(5) and (1) of the Act through unilaterally changing the wages of its employees by discontinuing payment to them of an established, longstanding Christmas bonus (substituting therefor a cheese and bologna package), without bargaining with and agreement of the employees' duly designated exclusive bargaining representative (the Charging Party, Bakery, Confectionary[2] and Tobacco Workers International Union, AFL-CIO-CLC, Local No. 6, herein).

On the entire record and my observations of the testimonial demeanor of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times the Respondent, a Pennsylvania corporation with its principal office in Williamsport in that State and engaged in the manufacture and distribution of bread products, has maintained facilities, here in-

[1] Complaint issued on June 30, by Board's Regional Director for Region 4, growing out of charge filed on February 24, 1982, by the above Charging Party Union.

[2] Sic in complaint caption; "Confectionery" in charge.

volved, in Norristown as well as at 3375 Lycoming Creek Road and Washington Boulevard in Williamsport, likewise in Pennsylvania. During the representative year immediately preceding issuance of the complaint, the Respondent purchased and received at its said Norristown and Williamsport facilities, directly in interstate commerce from places outside of Pennsylvania, goods and materials valued in excess of $50,000.

I find that at all material times the Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and the Charging Party union a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Background*

The Respondent is a large baking enterprise with at least 15 different locations in Pennsylvania, New York, and Maryland, including those in Norristown (bread and rolls), and at Lycoming Creek Road (rolls) and Washington Boulevard (cake) in Williamsport, Pennsylvania, the latter three each with at least some bargaining units of employees represented by the Charging Party union here. Other of the Respondent's employees are represented by other unions. The Respondent also employs nonunionized employees at its facilities. The unionized bargaining unit represented by the Charging Party in the Respondent's Norristown plant consists of several hundred employees, while those at Williamsport total around 200. The Respondent's Williamsport bread plant, with about 100 employees, is ununionized. All in all, according to the Respondent's senior vice president for law and labor relations, Charles Caffrey, at the end of 1981 the Respondent had about 1500 unionized and 1200 nonunionized employees, with perhaps 9 or 10 out of its 15 facilities nonunionized.

It is undisputed that for over 40 years the Respondent has maintained, without change, a Christmas cash bonus system for all of its employees, unionized as well as nonunionized, based on an employee's longevity in the Respondent's service.

It is also undisputed that commencing for Christmas of 1981 this long-standing Christmas bonus system was discontinued for all *union* employees and supplanted by a 5-pound package of cheese and bologna, while all *non*union employees received not only such a package but *also* a cash bonus of either $30 or $75 (dependent on whether they had worked for the Respondent for less or more than 10 years).

It is the discontinuance of the cash bonus for the Respondent's *union* employees represented by the Charging Party Union, around which the controversy here swirls. The Respondent insists this was done with the consent of the Union, but the Union staunchly denies it. The circumstances surrounding this change in a 40-year-old imbedded practice will now be addressed.

At the outset, it is appropriate to point out that the Respondent concedes that it was not at liberty to discontinue or change the long-established cash bonus system without bargaining with the Charging Party Union, with whom it has collectively bargained labor contracts covering the unit employees here. But the Respondent insists that this it did and that the Union agreed—orally, with no confirmatory document of any kind.

The Respondent's senior vice president for law and labor relations, Charles Caffrey, an attorney who has been in its employ for 16 years, testified that shortly after the Respondent was acquired in 1981 by a Canadian company (George Weston Limited of Canada) which installed its own president, one Wygant, it was decided to discontinue the longstanding Christmas bonus system for the Respondent's *unionized* employees and to supplant it with a package of cheese and bologna, while at the same time and in addition to the cheese/bologna package to give only to the *non*unionized employees a cash bonus *larger* than the previous bonus.[3]

Before carrying out the new policy, the Respondent consulted with and was formally advised by its attorneys, in a well-considered memorandum of September 24, 1981 (R. Exh. 4), which in this respect accords with the law, that it could not lawfully abrogate or alter its long-established cash bonus system without bargaining with its employees' bargaining representative. It is undisputed that at no time did the Respondent indicate to the Union that it intended to continue, much less to increase, the Christmas cash bonus for its nonunionized employees at the same time it discontinued it for its unionized employees—Caffrey not only concedes this but continues to insist that this was and is "none of the union's business," the Respondent's treatment of its nonunion employees being a matter solely for the Respondent's concern.

Caffrey testified that, in order to effectuate the Respondent's decision to discontinue its longstanding Christmas cash bonus system (i.e., at any rate as to its *unionized* employees), on October 5, 1981, he telephoned Union President Joseph Balzer on that subject, conveying to the latter the Respondent's desire in that regard to substitute a "food package" for the previous cash for "*all* employees" (emphasis added). Balzer indicated he would have to "get to [my] people" for their reaction. On October 29 Caffrey again telephoned Balzer on this subject, and was informed by Balzer that he had no answer for him yet. But, according to Caffrey, when he by "chance encounter[ed]" (Caffrey's testimony expression) Balzer on November 7, 1981 at a Teamsters social cocktail affair, Balzer made the unsolicited and unwitnessed remark to him that "By the way with respect to the Christmas Bonus issue: it's okay, go ahead and do it, but make sure that the gift is nice." Caffrey concedes that Balzer—then seemingly in an advanced or terminal stage of mouth and throat cancer and having undergone repeated surgery therefor, as will be shown below—"may have been drinking."

Caffrey concedes that he at no time confirmed this alleged "agreement" on Balzer's part, by memorandum or letter or otherwise, nor even made a note of it in any of his or the Respondent's files. Caffrey also acknowledges

[3] Although at the hearing Caffrey claimed credit for these ideas, Union President Balzer has sworn (G.C. Exh. 7, p. 4) that Caffrey blamed Wygant, the new Canadian firm president. It is unimportant here who generated the idea or ideas, it being clear that they in fact constituted the Respondent's policy carried out by it.

that at no time did he so much as mention the Respondent's intention, as part of its plan to dismantle the existing cash Christmas bonus system, not only to preserve but also to increase it *only* for its *non*unionized employees.

In early December 1981, the Respondent distributed to its unionized unit employees a cheese and bologna package instead of their longstanding Christmas cash bonus, with a letter, dated December 1, which was also given to all nonunionized employees along with the same cheese and bologna package. The letter (GC Exh. 2) states (emphasis added):

> To *All* Stroehmann Employees,
>
> I would like to take this opportunity to extend my personal best wishes and those of the officers and staff to you and your family.
>
> May you enjoy a happy and safe Holiday Season and approach the New Year with hope and confidence in yourself and the continued success of your Company.
>
> The Christmas gift is presented in the holiday spirit, in recognition of your contributions, as part of Stroehmann Brothers Company.
>
> We look forward to the upcoming year with optimism and remain confident of your continued support.
>
> /s/ J. P. Wygant
> J.P. Wygant
> President

At the same time or a few days later the Respondent handed out to its *non*unionized employees *only*, in addition to the cheese and bologna package, a Christmas cash bonus *larger* than any previously distributed, accompanied by the following letter dated December 11, 1981 (G.C. Exh. 3; emphasis added):

> Dear *Stroehmann* Employee:
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> This year, Stroehmann Brothers Company has changed its practice of giving each employee a Christmas check in an amount reflecting each year of additional service. Beginning this Christmas, *each* full time employee with ten or more years of continuous service, as of Christmas Day, will receive a Christmas check in the amount of $75 and those with fewer than ten years of continuous service, as of Christmas Day, will receive $30.
>
> We hope that the gift you receive will add to the joy of your Christmas Season.
>
> /s/ J. P. Wygant
> J.P. Wygant
> President

It is to be noted that notwithstanding the statement in the second sentence of this letter that "each" full-time employee "will receive" the specified larger Christmas cash bonus, that bonus was given to Respondent's *nonunion* employees *only*.[4]

Joseph Rauscher, vice president of Charging Party Union, testified that for the past 2 or more years he has carried the day-to-day burden of administering the Union's affairs because of the intermittent disability of its president, Joseph Balzer, who has for 3 years been suffering from terminal cancer of the mouth and throat metastasizing throughout his head, involving repeated surgery. Thus, Balzer had been to the union office only once in the 4-month period before this trial; and at the time of (and for a week preceding) this trial he was again hospitalized and comatose. The Respondent concedes it was and is familiar with Balzer's condition.

Rauscher swore unequivocally that there had been no negotiated or agreed change in the Respondent's long established Christmas cash bonus system, with him or to his knowledge with Balzer or any other union representative. According to Rauscher, whose testimony, although disputed by Caffrey, I credit, in the fall of 1981 Caffrey broached to him the idea of a change in the established Christmas bonus system from cash to a food package, and Rauscher's response was that he would poll his constituents, which he did through his business agent (Donald Tholan) and committeeman (Carl Minott)—who corroborated his testimony in this respect—and who subsequently reported to him that the employees were unwilling to do so, which Rauscher relayed to Caffrey, who remarked only that he was "sorry to hear that, but if that's the way it is' that's the way it is." According to Rauscher, he heard nothing further about the matter until he learned in early December (1981) from his steward that the substitution of cheese and bologna for cash had been made by the Respondent at all locations for its unit employees and that "the people are screaming up here." When, thereupon, Rauscher promptly telephoned Caffrey about it, he was informed by Caffrey that Balzer—then again hospitalized—had agreed to it. Rauscher, who was "in charge" under the circumstances detailed involving Balzer's continuous absences because of his dire illness, pointed out to Caffrey that Rauscher was totally unaware of any such alleged "agreement," which was, indeed denied by Balzer. Rauscher thereupon referred the matter to the Union's attorneys, resulting in the charge and complaint here. Rauscher's testimony impressed me as straightforward and I credit it.

In the described posture of the record, with Balzer hospitalized for terminal cancer of the mouth and throat,

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[4] The Respondent's Christmas cash bonuses in years before 1981 had been accompanied by the following note (R. Exh. 1) to all (union and nonunion) employees:

> We take pleasure in giving you this Christmas remembrance. This has been made possible through the co-operation and effort of all employees of the company this year.
>
> Whether or not similar gifts can be made in the future will depend upon the operating results of the company at that time.

In connection with the last paragraph, it is to be noted that (1) the issue in the instant case is *not* Respondent's right to change its bonus system but only whether the Respondent was required to bargain about it or receive its unit employees' bargaining representative's acquiescence before doing so; (2) the Respondent concedes it could not lawfully discontinue or change its bonus system unilaterally; and (3) no claim of bargaining impasse or of economic necessity is advanced or involved here.

comatose, and for that reason unable to testify at this trial, I received in evidence, at the behest of the General Counsel and the Charging Party, the pretrial affidavit of Joseph Balzer (G.C. Exh. 7), which had been sworn to by him on April 5, 1982, some 8 months before this trial, and further identified here as his by the Charging Party's attorney, who testified he was present when the affidavit was given and that the words were those of Balzer. My receipt in evidence of this affidavit, in the absence of the affiant under the circumstances described, was preceded by thorough argument on the record followed by my decision with a detailed rationale, also on the record and which need not here be rehashed. The Respondent's counsel, who submitted a memorandum (R. Exh. 7-Ident), in opposition to the receipt of Balzer's affidavit, conceded that the memorandum, prepared in advance of this trial, was prepared by him in anticipation that the affidavit would be offered, he having been placed on notice to that effect by the General Counsel prior to the trial.[5] While receiving, properly as I continue to believe,[6] the affidavit under the special, extraordinary, and factually undisputed circumstances described—the Respondent raises no issue concerning Balzer's condition—I nevertheless did so with specific provision, as my order on the record will disclose, affording the Respondent express opportunity to test the affidavit by taking the deposition or testimony of Balzer, at bedside if necessary. Notwithstanding this express safeguard provision, since I received no indication whatsoever from the Respondent, as required by my order, of any intention or desire on its part to proceed with such arrangement, on December 20, 1982, I closed the record and prescribed a time for submission of proposed findings and conclusions and of briefs. (A copy of my order of December 20, 1982, is hereto attached as "Appendix A.")

Balzer's affidavit states that when Caffrey approached him about the proposed Christmas bonus system change, Caffrey assured him that under the Respondent's plan "each [employee] would receive the same" (G.C. Exh. 7, p. 2); that "I [Balzer] was surprised that he had come to me about Norristown instead of going to Rauscher" (id); that when he "ran into Caffrey on about November 7, 1981 at a Teamsters affair I was upstairs having a cocktail with the guests including Caffrey. Caffrey asked me to step out in the hall. He asked me whether I had an answer about the Christmas bonus. I said No, as far as I am concerned I don't give a shit one way or another but I still don't have any word from my agents. He said he wanted to get it cleared up since the time was getting close. The following week at the officers meeting I mentioned it to Raucher and he said they had a meeting at Norristown coming up and would have the people vote. Shortly thereafter I went into the hospital and don't know when Raucher called him. Sometime in January 1982 before filing the Charge I called Caffrey. I wanted to know what was going on, if he was trying to destroy me. I said he told me the bonus would be the same for all but the non-union people got more. He said it wasn't him that did it, it was Pete Weygant the President who did it. I do not know why Caffrey approached me with this issue since he should have gone to the agent Joe Rauscher first. Rauscher had the authority to make the decision without consulting with me first. I never told Caffrey that Rauscher was not competent to make decisions. When I was in the hospital Rauscher was acting President" (id., pp. 2–4; subscribed and sworn to by Balzer on April 5, 1982).

B. *Discussion and Resolution*

Since the Respondent in December 1981 concededly discontinued its long-established Christmas cash bonus system for its unionized employees here (only) and since the Respondent further concedes it could not lawfully do so without bargaining with the Union, the Respondent has accordingly necessarily assumed the burden of establishing, by the required fair preponderance of substantial credible evidence upon the record as a whole, that it was freed from this obligation or satisfied it.[7]

It is hornbook law that a waiver, surrender, or abandonment of a known right must be clear, unambiguous, and unmistakable, and that it will not be lightly implied or inferred.[8]

The Respondent rests its defense on its contention that the Union surrendered the employees' important and valuable rights here—not just for 1981 but for all future time—through an unwitnessed remark made by Union President Balzer to attorney Caffrey at a cocktail party of another union on November 7, 1981. Since Caffrey's testimony to that effect is wholly uncorroborated and unsupported, it must stand on its own feet or the Respondent's defense must fail.

In the assessment of Caffrey's testimony, it is appropriate at the outset to observe that he is an interested and directly concerned witness. It is further to be noted that Caffrey, an attorney of many years' standing and long experienced in labor law matters including even as an employee of the Board, acknowledges that in no way did he at any time commit to writing, confirm by letter or otherwise, or even make any meaningful memorandum for his or his Company's files as to the alleged "agree-

[5] Among other reasons advanced by the Respondent in objection to receiving Balzer's affidavit is that "no documentary evidence substantiates" (R. Exh. 7-Ident., p. 4) it. Although this is not the test, the same is true of Caffrey's testimony.

[6] National Labor Relations Act, Sec. 10(b); Fed.R.Evid. 803(24), 804(b)(5), and 804(a)(4) and (5); *Eastern Market Beef Processing Corp.*, 259 NLRB 102, 104–105 (1981), and cases cited; *Justak Bros. & Co.*, 253 NLRB 1054, 1080–81 (1981), enfd. 664 F.2d 1074, 1081 (7th Cir. 1981); *Central Freight Lines, Inc.*, 250 NLRB 435 (1980), modified 653 F.2d 1023 (5th Cir. 1981); *Goodwater Nursing Home*, 222 NLRB 149 fn. 2 (1976); *Granite Hosiery Mills*, 124 NLRB 1426, 1429-30 fn. 2 (1959).

[7] The Respondent's burden may be likened to that of a party to a contract who asserts that he is excused from performance because the other party without consideration agreed to accept less than the required performance; or to that of a borrower who contends he is freed from further obligation because the lender agreed orally to receive less than full payment as full payment.

[8] *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 750–754 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); *NLRB v. Item Co.*, 220 F.2d 956, 958–959 (5th Cir. 1955), cert. denied 350 U.S. 836 (1955), rehearing denied 350 U.S. 905 (1955); *NLRB v. J. H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948), cert. denied 335 U.S. 814 (1948); *Sun Oil Co. of Pennsylvania*, 232 NLRB 7 (1971); *C & C Plywood Corp.*, 148 NLRB 414, 416–417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), revd. 385 U.S. 421 (1967); *Tucker Steel Corp.*, 134 NLRB 323, 332 (1961), and cases cited; *Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098 (1949).

ment" which he claims Balzer concluded with him on behalf of some 270 employees eliminating a prized and valuable cash bonus practice which had been in effect for over 40 years. This appears to have been in a marked contrast to Caffrey's ascribed practice, since the summer of 1971, of committing some dealings with the Union—in addition, of course, to collective agreements—to writing. The particular matter here involved an established practice firmly imbedded for upwards of 40 years affecting hundreds of employees and potentially many thousands of dollars, to say nothing of the tens of thousands of future dollars involved for succeeding years—hardly the kind of matter to be laid to rest incautiously by an experienced attorney on the basis of an unwitnessed cavalier remark at a cocktail party.

The Charging Party's vice president and operating official, Rauscher, substantially at its helm in view of its president's grievous terminal illness, whom I observed closely as he testified, impressed me as a stolid, unimaginative, candid, and forthright witness whose testimony rang true and is worthy of belief. After observing him with care as he testified, I cannot accept the suggestion that his testimony, which I have described above, is a sheer fabrication or a figment of his imagination, any more than I feel justified in assuming that Balzer's sworn statements—also contrary to Caffrey's testimony—are likewise sheer fabrication.

In view of these considerations, even if Caffrey's testimony concerning his crucial alleged conversation of November 7, 1981, with Balzer at the Teamsters cocktail party were to be viewed arguendo as uncontradicted, and even without resort to the contents of Balzer's affidavit to the contrary, I would still not credit Caffrey's testimony concerning that alleged conversation, within the context that Balzer's inability to testify herein in person is fully and uncontrovertedly explained. I regard this position as fortified by the Respondent's unexplained failure to avail itself of the protective provisions to my receipt of Balzer's affidavit, to take his testimony or deposition at bedside if necessary.

Moreover, it may be considered that even if, again arguendo, an "agreement" was struck with the Union as the Respondent contends, striking down the longstanding Christmas cash bonus system for cheese and bologna, since the Respondent did not honor that "agreement" the Union was in any event freed from its "obligation." Caffrey, the Respondent's spokesman in these matters, testified that, in his preliminary talk with ailing Union President Balzer, Caffrey had expressly represented to and assured Balzer that the substitution of the Christmas food package for the Christmas cash bonus was intended by the Respondent for *all* of its employees.[9] Concededly in no way did Caffrey indicate—indeed, he concealed—that while the Respondent intended to give the same Christmas food package to all (nonunion as well as union) employees, *it would at the same time not merely continue but increase the Christmas cash bonus only for its unonunion employees.* There is no reason to suppose that Balzer, any more than any self-respecting union official, would agree to any such absurd, self-defeating, and disreputable (from his point of view) arrangement; and there is no evidence or claim that Balzer ever did. Since, however, the scheme as *carried out* by the Respondent—unlike that as represented to Balzer—was precisely that, namely, giving a Christmas food package to *all* employees but discontinuing the Christmas cash bonus only for unionized employees while at the same time increasing it for the nonunionized employees, no such offer had ever been made by the Respondent to the Union and therefore there could be no meeting of the minds or agreement to that effect. Caffrey's explanation for this, at the trial, that it was "none of the union's business," in addition to smacking of flippancy, is wide of the point of whether a binding arrangement eventuated from a contractual meeting of minds.

Under all of the circumstances, it is accordingly found and determined that the Respondent has failed to sustain its burden of proof of establishing, through a preponderance of substantial credible evidence upon the record as a whole, that the Charging Party Union acceded to a surrender or waiver of a change in the unit employees' long established Christmas cash bonus entitlement, or that Respondent was freed of its obligation in that regard. It is therefore found and determined that, through the Respondent's unilateral change thereof as alleged in the complaint, the Respondent violated and continues to violate Section 8(a)(5) and (1) of the Act.

On the foregoing findings and the entire record, I state the following

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted in this proceeding.

B. Through discontinuing, in and since December 1981, its established Christmas cash bonus system for its employees represented by the Charging Party Union herein, without bargaining collectively with or obtaining the acquiescence of said bargaining representative, under the circumstances hereinabove described, the Respondent unilaterally changed the terms and conditions of employment of said employees in violation of Section 8(a)(5) of the National Labor Relations Act.

C. The Respondent thereby also interfered with, restrained, and coerced employees, and continues so to do, in the exercise of their rights under Section 7 of said Act, thereby violating Section 8(a)(1) of the Act.

D. The foregoing unfair labor practices, in violation of the Act, and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.[10]

REMEDY

The Respondent should be required to cease and desist from continuing the violations found, and from engaging in like and related violations of the Act. The Respondent

[9] I.e., nonunion as well as union, since the Respondent had for over 40 years maintained its Christmas cash bonus system uniformly for both without distinction.

[10] The parties' proposed findings and conclusions are, to the extent consistent with the findings and conclusions made herein, allowed; and, to the extent inconsistent, disallowed.

should also be required to reinstate and reinstitute its long-established Christmas cash bonus system, as of prior to December 1981, and to make whole all of its unit employees represented by the Charging Party Union here, for all bonus moneys unpaid since that date, together with interest at the currently required rates under prevailing Board policy.[11] Finally, the usual informational notice to employees should be required to be posted.

[11] Although I am aware that the Respondent made or attempted to make some distribution among the unit employees of its cheese and bologna package, there is no evidence as to who did or did not take it, while there is ample evidence that it was neither desired nor regarded as a substitute for their longestablished Christmas cash bonus. Under these circumstances, I do not believe that it would be fair, equitable, or practicable to provide for an offset of the "value" of this package against the cash bonus, since that would in effect compel the unwilling employees to accept it even though they did not want it. Furthermore, since it was the Respondent who created this problem through its unlawful action in unilaterally abrogating the longstanding Christmas cash bonus, it is not inequitable to allow the balance of any resulting damage to fall upon the party (i.e., the Respondent) who caused it, it being on general equitable principles for the wrongdoer to extricate itself from the consequences of its own wrongdoing. Cf., e.g., Judge Learned Hand, in *NLRB v. Remington Rand,* 94 F.2d 862 at 872 (2d Cir. 1938), cert. denied 304 U.S. 576 (1938). I shall accordingly treat the cheese and bologna, having in mind also that it was distributed to nonunion employees as well together with an increased bonus, as an unsolicited gift or gratuity from the Respondent to all of its employees in what is or was sometimes regarded as the true Christmas spirit. Cf. Dickens, *A Christmas Carol.*

[Recommended Order omitted from publication.]

APPENDIX A
ORDER CLOSING HEARING AND RECORD, &c.

Upon the basis of my order during trial on November 30, 1982 affording the Respondent opportunity to take the testimony or deposition of Joseph Balzer, as and under the circumstances detailed in my said order, and no action under or response to that order having been taken by or received from the Respondent notwithstanding expiration of the time allotted therefor, and upon all papers and proceedings heretofore had herein including the transcript of the hearing herein, it is hereby

ORDERED, that the record and hearing in this proceeding be and they are hereby closed, and that the parties shall have to and including January 24, 1983 for submission of proposed findings and conclusions and of briefs.

Dated at Washington, D.C.
December 20, 1982

/s/ Ohlbaum
Stanley N. Ohlbaum
Administrative Law Judge